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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

13 UNITED STATES OF AMERICA

CASE NO. CR 4:14-00582 PJH

14 | v.

**MEMORANDUM IN OPPOSITION TO
DEFENDANTS' PROPOSED JURY
INSTRUCTION AND PROPOSED MODIFIED
INSTRUCTION NO. 7**

15 ALVIN FLORIDA, JR.,
16 ROBERT ALHASHASH RASHEED,
17 JOHN LEE BERRY, III, and
REFUGIO DIAZ.

Court: Hon. Chief Judge Phyllis J. Hamilton

19 || Defendants.

The rule of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984), should not apply to this case. *Copperweld* comes into play where an alleged conspiracy takes place only within a single company. Here, the allegation and all of the evidence show that the defendants – even if some combination of them were part of the same company at some point – conspired with other bidders at the real-estate foreclosure auctions, bidders who did not work for Al Florida. The government has not accused the defendants of conspiring only with each other. Defense counsel’s arguments have created such a risk of jury confusion that the government proposes to add language to Instruction No. 7 to

1 clarify this issue. It is important that the jury understand that they should only acquit the defendants (on
2 *Copperweld* grounds) if they conclude that the conspiracy included only Al Florida's company, and no
3 one else – a finding that would be impossible to sustain based on the facts presented at trial. The
4 government's proposed revised jury instruction is attached.

5 *Copperweld* goes to the Sherman Act's requirement that a conspiracy to restrain trade involve an
6 agreement between at least two parties. *Copperweld*, 467 U.S. at 770. *Copperweld* addresses the
7 situation where two alleged conspirators actually have a parent-subsidiary relationship and thus are not
8 separate legal entities. *Id.* The case stands for the proposition that commonly owned or controlled
9 corporations cannot be deemed separate legal entities which can individually be held liable for
10 conspiring to restrain trade under the Sherman Act. Defendants do not cite any authority suggesting that
11 this instruction has any relevance to the case at hand.

12 That is because no reasonable jury could conclude that the defendants are not guilty based on the
13 defendants' instruction. Not a single case cited by the defendants supports the proposition that these
14 cases would extend to a case such as the one charged. The record is replete with evidence that the
15 defendants conspired with others. Doug Ditmer, Danli Liu, Brad Roemer, Miguel DeSanz, and Jorge
16 Wong all testified that they rigged bids with the defendants. This is not a case wholly involving one
17 entity or a conspiracy only among the four defendants themselves. During the trial, the defendants
18 themselves have elicited testimony from the witnesses about all of the other coconspirators involved and
19 all of the additional names on the round sheets. For example, during the cross examination of Jorge
20 Wong on November 8, Rasheed's counsel focused on the sheer number of other competitors listed on
21 Wong's spreadsheet of round participants. Thus, defendants' proposed instruction is inapplicable.

22 Defendants' proposed instruction, moreover, will only sow confusion. It wrongly suggests that
23 the defendants cannot be part of the same conspiracy if they worked at the same company. That is a
24 complete misreading of *Copperweld*. *Copperweld* means that there cannot be a conspiracy that occurs
25 wholly within one company. Multiple employees of a company can be part of a conspiracy, as long as
26 the conspiracy also includes competitors. In a price-fixing conspiracy among large multinational
27 corporations, for example, many employees from each company may be involved in a price-fixing

1 agreement. It would be absurd to create a rule that an employee could not be liable for price fixing
2 because other individuals at his or her company were also involved in the criminal conduct.

3 Defendants' instruction is confusing for several additional reasons. First, it suggests that the
4 defendants are part of the same "economic unit" even if only a "combination of defendants" were not
5 actual or potential competitors. This is particularly troubling in light of the fact that defendant Rasheed
6 was not an employee of defendant Florida's for more than a year of the conspiracy period. It would be
7 wrong for the jury to find that, for example, because defendants Diaz and Berry were employees of
8 Florida, that Rasheed was part of the economic unit as well. Moreover, the term "unity of economic
9 interest" is vague and undefined. The jury could find that all members of the conspiracy shared a "unity
10 of economic interest" because they all wanted to buy properties at the lowest price and wanted to make
11 money from rounds. "A commonality of interest exists in every cartel." *Freeman v. San Diego Ass'n*
12 *of Realtors*, 322 F.3d at 1133, 1148 (9th Cir. 2003).

13 Moreover, the determination of whether the competitors are a "single entity" is a fact-intensive
14 analysis involving many factors, as defendants' own citation demonstrates. *Id.* 1147-48. The
15 defendants' instruction includes none of these factors, leaving the jury adrift.

16 The government proposes to clarify the issue by modifying the Instruction No. 7, entitled
17 "CONSPIRACY – KNOWLEDGE OF AND ASSOCIATION WITH OTHER CONSPIRATORS." The
18 modified instruction is attached as Attachment A. Specifically, the government requests that the Court
19 add two sentences to the end of the instruction: "A company's employees cannot conspire only amongst
20 themselves. However, if someone inside the company agrees with someone outside the company to rig
21 bids at the foreclosure auctions, that is an unlawful bid-rigging conspiracy." This language addresses
22 defendants' concern that the conspiracy must include competitors while ensuring that the jury does not
23 improperly assume that employees of the same company cannot all be part of a single conspiracy.

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1 For the foregoing reasons, the government respectfully requests that the Court adopt the
2 government's revised proposed Instruction No. 7 and reject the defendants' proposed "SINGLE
3 ENTITY RULE" instruction.

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6 Dated: November 9, 2016

Respectfully submitted,

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/s/
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